

Chuck

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER)
RIGHT 41D-G(W)194315-02 BY ROCK)
CHUCK RANCH)

FINAL
ORDER

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on November 22, 2000. On December 7, 2000, the Department received a request for an extension of time, 10 days, to file exceptions. The request was granted. On December 8, 2000, the Department received exceptions to the Proposal without a request for oral argument.

The Proposal recommended denying Application for Change of Appropriation Water Right 41D-G(W)194315-02.

Applicant excepted to Finding of Fact 4 where the Hearing Examiner found Applicant did not prove the proposed point of diversion change would not adversely affect the use of the existing water rights of other persons. Applicant's exception is based on the fact that Water Right 41D-W 194315-02 is superior in priority to Objector Burk's water right and that the undisputed fact of priority means Applicant's use of his water right to Burk's detriment is not an adverse effect.

Mont. Code Ann. § 85-2-402(2)(a) (1999) provides the Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed change would not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for a permit or certificate has been issued or for which a state water reservation has been issued. The statute does not specify junior or senior water rights, it states existing water rights. Clearly, allowing Applicant to move his point of diversion upstream of Objector Burk's point of diversion could adversely affect Objector Burk's water right. Absent a proposed plan for safeguards to protect Burk's existing

water right, the Department cannot issue an authorization to change appropriation water right.

Applicant further excepts to Findings of Fact 5 where the Hearing Examiner found Applicant had not proven the proposed diversion, construction, and operation of the appropriation works is not adequate, citing overflow problems that would only worsen if the change is granted. Applicant, in his exceptions, first stated there was no evidence to support the finding, then went on to attempt to explain away the overflow problems. Finally Applicant stated even if there were significant evidence to support the finding of inadequate means of diversion, construction, and operation of the appropriation works, it would be more reasonable to impose conditions on approval pursuant to Mont. Code Ann. §85-2-402(8) rather than outright denial of the change authorization.

Once again, the statute is clear. In order for the Department to grant a change of appropriation water right, the applicant must prove the proposed means of diversion, construction, and operation of the appropriation works are adequate. Here, Applicant has not provided that proof.

For this review, the Department must accept the Proposal's Findings if the findings are based upon competent substantial evidence. The Department may modify the conclusions of law if it disagrees with the Proposal for Decision. Mont. Code Ann. § 2-4-621(3) (1999) and Mont. Admin. R. 36.12.229 (1999). The Department has considered the exceptions and reviewed the record under these standards. The Department finds the Proposal is supported by the record and the facts were properly applied to the law.

THEREFORE, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the December 22, 2000, Proposal for Decision, and incorporates them by reference.

Based on the record in this matter, the Department makes the following:

ORDER

Application for Change of appropriation Water Right 41D-G(W)194315-02 by Rock Chuck Ranch is denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this 31st day of January, 2000.



Jack Stults, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify a true and correct copy of the Final Order was
duly served upon all parties listed below this 18th day of ~~January~~, *February*
2001.

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Jennifer Hensley
Hearings Unit

CASE # 194315-02

Chuck

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA
* * * * *

IN THE MATTER OF APPLICATION TO)	PROPOSAL
CHANGE APPROPRIATION WATER RIGHT)	FOR
41D-G(W)194315-02 BY ROCK CHUCK)	DECISION
RANCH)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on April 17, 2000, in Dillon, Montana, to determine whether an authorization to change appropriation water right should be issued to the Applicant for the above-entitled application under the criteria set forth in Mont. Code Ann. §85-2-402 (2) (1999).

APPEARANCES

Applicant Rock Chuck Ranch appeared by and through counsel John Bloomquist. Randall Brooks, manager of Rock Chuck Ranch, Larry Bradley, former area property owner, and John Westenberg, Land and Water Consulting, Inc., were called to testify by the Applicant. Objectors Burk Ranches, Inc. and Rieber Ranch appeared by and through counsel W. G. Gilbert III. Gerald Burk testified for Burk Ranches, Inc. John C. Rieber testified for Rieber Ranch.

EXHIBITS

Applicant offered six exhibits for the record, which were admitted.

Applicant's Exhibit RC-1A is a copy of a portion of an aerial photograph showing portions of sections 32 and 33 of Township 3 South, 9 West, and sections 4 and 5 of Township 4 South, 9 West with pump sites marked.

Applicant's Exhibit RC-1B is a copy of an August 1, 1965 aerial photograph used in the Beaverhead County Water Resources Survey. The photograph shows ditches and irrigation in sections 4, 5, 8, and 9 of Township 4 South, 9 West. The objection to this exhibit was over ruled.

Applicant's Exhibit RC-2 consists of 12 photographs labeled 2A through 2K. The photos show the proposed point of diversion, the historic ditch system, portions of the place of use, and Rock Creek measurement sites.

Applicant's Exhibit RC-6 is a copy of a 1923 Beaverhead County Decree No. 2632 containing 23 pages, and a copy of a 1954 Beaverhead County Supplemental Decree containing 5 pages.

Applicant's Exhibit RC-8 consists of 8 pages of the Beaverhead County Water Resources Survey notes.

Applicant's Exhibit RC-11 consists of an April 11, 2000 photograph of a diversion from the Hand Ditch.

Objector Burk Ranches, Inc. and Rieber Ranch introduced seven combined exhibits, which were admitted.

Objector Burk Ranches' Exhibit A is a copy of a map of ditches for 1923 Decree No. 2632 upon which various points of diversion have been marked.

Objector Burk Ranches' Exhibit B consists of one photograph of the washed out Middle (Gransberry-Jensen) ditch.

Objector Burk Ranches' Exhibit C consists of eleven photographs showing various portions of the Hand Ditch.

Objector Burk Ranches' Exhibit D consists of five photographs showing Burk Ranches' property below the Upper (Hand) ditch.

Objector Burk Ranches' Exhibit E consists of two photographs showing ice in or below the Upper (Hand) ditch.

Objector Burk Ranches' Exhibit O-G consists of eleven photographs; ten are of portions of the Upper (Hand) ditch and one is of Burk Ranches' land below the Upper (Hand) ditch just upstream of their number one pump in the ditch.

Objector Burk Ranches' Exhibit O-F consists of a one page table of weir readings entitled "Weir Readings in Hand Ditch." The objection to admission of this exhibit is overruled. The information was provided at the earliest possible time after the measurements stopped.

PRELIMINARY MATTERS

Prior to issuance of this order Applicant's counsel stipulated to substitution of counsel. Applicant's counsel is now John S. Warren.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Change of Appropriation Water Right 41D-G(W)194315-02 in the name of Rock Chuck Ranch, L.P., and signed by Michael Avila was filed with the Department on June 19, 1996 at 9:45 am. Rock Chuck Ranch, L.P. received 100% of the interest of the Michael Avila Estate in this water right. (Department file, Department records)
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.
3. Applicant seeks to change the point of diversion of Water Right No. 41D-W194315-02 to an existing headgate on the "Burk" (aka Upper or Hand) Ditch in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 32, Township 3 South, Range 9 West, Beaverhead County, Montana. The proposed change is for 100% of the Applicant's portion of Water Right No. 41D-W194315, or 1.18 cubic feet per second (cfs) up to 78.28 acre-feet to irrigate 23 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 4, Township 4 South, Range 9 West, in Beaverhead County Montana.
4. Applicant has not proven the proposed point of diversion change will not adversely affect the use of the existing water rights of other persons. Applicant is currently diverting from Rock Creek at a point where the flow may be bolstered by flood irrigation from Objector Burk Ranches' use of the Hand Ditch. Moving Applicant's point of diversion upstream to the Hand Ditch may result in Applicant diverting water from Rock Creek where it is not bolstered by these return flows. Since the source is less at the new point of diversion, Objector Burk Ranches, an upstream junior, could become subject to calls by the Applicant where historically that has not occurred. The record does not reveal that this possible scenario will in fact occur;

but, the burden is on the Applicant to prove that this adverse effect will not occur. (Department file, testimony of Gerald Burk)

5. Applicant has not proven the proposed diversion, construction, and operation of the appropriation works are adequate. Although Applicant estimated the capacity of the ditch at selected sites and used the ditch as proposed on occasions in the past, the evidence also shows that the ditch overflows. Adding more water to the ditch can only worsen the overflow problem and contribute to a waste of water. (Department file, testimony of Randy Brooks, John Westenberg, Gerald Burk)

6. Applicant has proven the irrigation from the proposed point of diversion is a beneficial use of water. The flow rate and volume are reasonable for the area. (Department file and records, testimony of Randy Brooks, Gerald Burk)

7. Applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Department file)

8. No valid objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. §85-2-402 (1999).

2. The Department may approve a change subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for change approval. Mont. Code Ann. § 85-2-402 (8) (1999).

3. Applicant has not met the criteria for issuance of an authorization to change an appropriation water right. See Findings of Fact 4 and 5. Mont. Code Ann. §85-2-402 (8) (1999).

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Change of Appropriation Water Right 41D-G(W)194315-02 by Rock Chuck Ranch is hereby **DENIED**.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after service of the proposal. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 22nd day of November, 2000.



Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the PROPOSAL FOR DECISION was duly served upon all parties listed below this ^{22nd} day of November, 2000.

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